

**REVERSE and RENDER in part; REMAND in part; and Opinion Filed  
May 22, 2020**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-19-00149-CV**

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**CURTIS C. PENNINGTON, Appellant  
V.  
JOHN P. FIELDS AND KYLE B. PHILLIPS, Appellees**

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**On Appeal from the 162nd Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-16-15018**

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**MEMORANDUM OPINION**

**Before Justices Schenck, Osborne, and Pedersen, III  
Opinion by Justice Osborne<sup>1</sup>**

The trial court granted summary judgment for appellees John P. Fields and Kyle B. Phillips on appellant Curtis C. Pennington's claim for breach of contract. Because we conclude that the parties' contract unambiguously requires Fields and Phillips to purchase Pennington's shares in their closely-held corporation, we reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

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<sup>1</sup> Justice Osborne has reviewed the briefs, record, and recorded oral argument and fully participates in this appeal although she was unable to participate in oral argument submission.

## BACKGROUND

Pennington, Fields, and Phillips are the only shareholders of Advantage Marketing and Labeling, Inc. They each own one third of Advantage's outstanding stock. They agree that a "Cross Purchase Agreement" dated November 21, 2006 (the "CPA") governs their ownership of Advantage's stock.

Pennington was a founding member of Advantage and until 2012 was its president and a member of its board of directors. In 2012, Fields and Phillips removed Pennington from the board, as an officer, and from Advantage's employ.<sup>2</sup> Pennington, however, continued to own one third of Advantage's shares.

In December 2015, Pennington gave Fields and Phillips written notice of his retirement as an Advantage shareholder under CPA Article V:

### ARTICLE V. RETIREMENT OF SHAREHOLDER

A retiring shareholder, upon giving 12 months written notice to the other shareholders and the Trustee, shall be obligated to sell all of his shares of the Corporation to the other shareholders for the term set forth in this Section V. Such sale shall be for the price set forth in this Agreement and shall be paid by the execution of a promissory note payable to the retiring shareholder. Such promissory note shall have a term of ten years, payable in equal annual installments and shall bear interest at the prime rate then applicable.

Fields and Phillips responded that Pennington was not a "retiring shareholder" under Article V because he was no longer employed by Advantage, and in any event,

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<sup>2</sup> See also *Pennington v. Fields*, No. 05-17-00321-CV, 2018 WL 3989537, at \*1–2 (Tex. App.—Dallas Aug. 21, 2018, no pet.) (mem. op.), and *Brown v. Pennington*, No. 05-14-01349-CV, at \*1, 2015 WL 3958618, at \*1 (Tex. App.—Dallas June 30, 2015, no pet.) (mem. op.), for further history of these parties' disputes regarding Advantage.

they were not required to purchase his shares. Fields and Phillips proposed a stock value purchase price of \$1.5 million, but Pennington did not agree with the proposed valuation and sought to initiate an arbitration procedure under Article VIII of the CPA. The parties were unable to resolve their dispute, and Pennington filed this suit for breach of contract and to compel arbitration under CPA Article VIII.<sup>3</sup>

Fields and Phillips responded to Pennington's motion to compel arbitration and also sought summary judgment on the ground that they had not breached the CPA. They argued that because they were not required by the CPA to purchase Pennington's shares, the CPA's arbitration provision was not triggered. The trial court initially denied Fields's and Phillips's motion for summary judgment and ruled that Pennington's motion to compel arbitration was not ripe for consideration until "after the Court decides whether there has been a breach of contract by Defendants." Pennington filed an amended petition alleging promissory estoppel in the alternative to his breach of contract claim, and Fields and Phillips filed a counterclaim for declaratory judgment "seek[ing] a declaration of the rights and obligations of the parties" under the CPA.

Pennington filed a motion for summary judgment on his claim for breach of contract and on Fields's and Phillips's counterclaim for declaratory judgment. The

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<sup>3</sup> Article VIII, "Arbitration of Valuation Where Agreement Cannot be Reached," provides in part: "If the parties have not stipulated a value . . . within two (2) years prior to an offer to sell by a withdrawing Stockholder, and the parties cannot agree upon a valuation within 10 days, such value shall be determined by submitting the matter to arbitration as provided for by this article."

trial court denied Pennington's motion and set the case for jury trial. Before trial commenced, however, the trial court apparently requested further briefing from the parties on the question whether CPA Article V created only an option, although the parties dispute the exact substance of the court's request. Fields and Phillips filed a "Second Motion for Summary Judgment," while Pennington filed a "Trial Brief." Fields and Phillips argued that the CPA provided an option to purchase "but the option never became a bilateral contract" binding them to purchase Pennington's stock "because they did not elect to do so." In his "trial brief," Pennington responded that Article V did not create an option.

The trial court signed an order granting summary judgment for Fields and Phillips and rendered judgment that Pennington take nothing on his claims. This appeal followed.

### ISSUES

In one issue, Pennington contends the trial court erred by granting summary judgment for Fields and Phillips. He argues that as a "Retiring Shareholder" under Article V of the CPA, he was required to sell, and Fields and Phillips were required to buy, his Advantage stock at the price determined by valuation according to Article VII of the CPA.<sup>4</sup> In a cross-point, Fields and Phillips contend that Pennington's summary judgment affidavit is conclusory and contains inadmissible parol evidence.

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<sup>4</sup> Article VII of the CPA, entitled "Valuation of Stock," permits the parties to stipulate to the stock's value when there is an offer to sell by a withdrawing stockholder.

## STANDARD OF REVIEW

All parties moved for summary judgment on Pennington's claim for breach of contract. Because summary judgment is a question of law, a trial court's summary judgment decision is reviewed de novo. *Learners Online, Inc. v. Dallas Indep. Sch. Dist.*, 333 S.W.3d 636, 640 (Tex. App.—Dallas 2009, no pet.). The standard of review for a traditional summary judgment motion pursuant to Texas Rule of Civil Procedure 166a(c) is threefold: (1) the movant must show there is no genuine issue of material fact and he is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed, material fact issue precluding summary judgment, we must take as true evidence favorable to the non-movant; and (3) we must indulge every reasonable inference from the evidence in favor of the non-movant and resolve any doubts in the non-movant's favor. *See id.* at 640–41 (citing TEX. R. CIV. P. 166a(c)). When both parties move for summary judgment and the trial court grants one motion and denies the other, we review both sides' summary judgment evidence and render the judgment the trial court should have rendered. *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

## DISCUSSION

The rules of contract construction are well-settled:

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered

meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms.

If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.

*Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex. 1983) (citations omitted).

Fields and Phillips argue that the trial court’s interpretation of the CPA was correct because (1) Pennington did not “retire,” and (2) even if Pennington did retire, Article V did not require them to purchase his shares. We consider each argument in turn.

Fields and Phillips argue that “Pennington was employed by ID Technology as a Flexo Operations Manager” when he gave them notice to purchase his shares. They contend that because he was not “retired” from any and all employment, he could not be a “retiring shareholder” for purposes of the CPA. This construction, however, assigns a definition to only one of the two words the parties used to describe who must comply with the paragraph’s provisions. It also disregards the context. The paragraph imposes requirements for the disposition of shares by a “retiring *shareholder*” in the context of an agreement that imposes restrictions on stock transfer.

The term “retiring shareholder” is not defined in the CPA. Consequently, we interpret the term “according to its ‘plain, ordinary, and generally accepted

meaning.” *Aflalo v. Harris*, 583 S.W.3d 236, 241 (Tex. App.—Dallas 2018, pet. denied) (en banc) (quoting *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)). Citing a dictionary definition, Pennington argues that the common meaning of “retiring” is “withdrawing,” and that a “retiring shareholder” is “any Advantage stockholder who wishes to completely sever his connection with the company by divesting of his entire ownership interest.” *See id.* (courts “typically look[ ] first to dictionary definitions” to determine a term’s common, ordinary meaning when it is not defined in the contract). He also argues that the parties to the CPA expressly stated their intention to restrict transfer of Advantage shares:

WHEREAS, it is the intention of the Stockholders that the stock remain closely held to protect their interests and to continue orderly management of the Corporation’s business;

and

WHEREAS, it is the intention of the Stockholders to provide for the purchase of stock at the death or disability of a Stockholder, or in the event of his desire to transfer any interest in the Corporation during his lifetime

...

the parties agree as follows: . . . .

When a contract’s language is plain, we must enforce it as written. *Aflalo*, 583 S.W.3d at 241. We conclude that Article V of the CPA applies to an Advantage shareholder who intends “to sell all of his shares of the Corporation” and is not limited to shareholders who have retired from all employment with Advantage or elsewhere.

Next, we consider whether Article V required Fields and Phillips to purchase Pennington's shares. Fields and Phillips argue that although a retiring shareholder must offer his shares to the other shareholders, the CPA is silent on the other shareholders' obligation to buy. They contend that they opted not to buy Pennington's shares, and choosing that option was not a violation of the CPA. They argue that "[i]f a court were to imply such a requirement, then the court would be adding words not contained in Article V and imposing an obligation to which Fields and Phillips never agreed." They rely on authority for the principle that a court may not add words to an agreement to create an obligation. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008).

Pennington contends that Article V is meaningless unless it imposes an obligation to buy as well as an obligation to sell. He argues that "[w]ithout a mutual obligation, there is no consideration for the retiring shareholder's agreement to sell all of his 1/3 ownership interest only to the remaining shareholders, on terms that delay his receipt of full payment for ten years while giving the purchasers immediate control of the stock." He relies on authority regarding implied promises. "[I]f one party makes an express promise that cannot reasonably be performed absent some type of performance by the other party, courts may imply a return promise so the dealings of the parties can be construed to mean something rather than nothing at all." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 850 (Tex. 2009). The court in *Mann Frankfort* explained that "when it is clear that

performance expressly promised by one party is such that it cannot be accomplished until a second party has first performed, the law will deem the second party to have impliedly promised to perform the necessary action.” *Id.* at 851. Fields and Phillips distinguish *Mann Frankfort* and other cases Pennington cites, arguing that (1) they did not involve an option contract or “a contract that would impose unreasonable and unwritten obligations on the other party,” and (2) under the contracts in those cases, one party could not perform until a counterparty performed a corresponding obligation. *See, e.g., id.* (where employee’s work as a certified public accountant “necessarily involved” his employer’s provision of confidential information and employee had promised not to disclose confidential information, court would imply employer’s promise to provide confidential information to the employee).

Fields and Phillips also argue that Article IV of the CPA not only demonstrates the parties’ intent to allow shareholders to sell to persons who are not shareholders, but also provides an avenue for a retiring shareholder to sell his shares if the remaining shareholders do not exercise the option to purchase under Article V. Under Article IV, entitled “Purchase of Stock During Lifetime of Selling Stockholder,” a shareholder who desires to sell any of his shares must first offer to sell the shares to the other shareholders, who “shall have the right to purchase all, but not less than all, of the stock so offered.” The written offer to the other shareholders must state the name of the intended transferee and the proposed terms. “The purchase price of any stock purchased under the terms of this Article shall be

the lower of (a) the price as provided below in Article VI[I] hereof or (b) the price offered by the said intended transferee.”

Pennington responds that remaining shareholders would never exercise an “option” under Article V if given the opportunity to purchase the same shares at the price offered by a third party under Article IV. An Article IV purchaser would become only a minority shareholder even with the purchase of Pennington’s entire one-third interest. In addition, the CPA does not provide for the payment of dividends to shareholders. These restrictions reduce the value of the shares to an outside purchaser. Consequently, Pennington argues, remaining shareholders could always obtain the shares at a lower price under Article IV and never “opt” to buy a retiring shareholder’s shares under Article V. He concludes that construing Article V as an “option” renders Article V meaningless and deprives a retiring shareholder of the only method of monetizing his investment in the company.

Fields and Phillips argue that where the CPA imposes a mandatory purchase requirement, it also provides the funding for it. They rely on Article II, which contains an obligation to purchase the stock of a deceased shareholder. They argue that Article IX ensures that life insurance proceeds will be available to purchase the deceased shareholder’s shares so that there will be no financial burden to the surviving shareholders. They contrast that to Article XI, which provides an option, but not an obligation, for shareholders to purchase a disabled shareholder’s stock with no corresponding funding. They contend that if Article V is mandatory, it

imposes a large financial burden on the remaining shareholders to purchase the shares at a time not of their choosing. Pennington responds that Article V addressed this problem by giving the remaining shareholders immediate control of the shares but allowing them ten years to pay at a favorable interest rate.

Pennington also relies on Article V's mandatory wording. He argues that Article V does not say a retiring shareholder shall "offer" his shares for sale. Instead, Article V provides that that a retiring shareholder "shall be obligated to sell" all of his shares. He argues that Article V explains to whom he must sell the stock, the terms for the sale, and the method for determining the price to be paid.

Article V's mandatory terms require Pennington to sell his shares to the other shareholders. He cannot comply with Article V's requirements unless the other shareholders have a corresponding obligation to buy. *See Mann Frankfort*, 9 S.W.3d at 851. Construing the CPA as a whole as we must do, *see Coker*, 650 S.W.2d at 393, we conclude that the parties envisioned and expressly planned for disposition of Advantage shares in different and specific ways when explicitly-defined circumstances arose. One of those circumstances—a shareholder's retirement—has arisen. Article V applies to address it, and requires Fields and Phillips to purchase Pennington's shares at a price to be determined by arbitration under Article VIII.

We sustain Pennington's sole issue. Given this disposition, we need not consider Fields's and Phillips's cross-issue.

## CONCLUSION

The trial court erred by granting summary judgment for Fields and Phillips and denying summary judgment for Pennington. We reverse the trial court's judgment and render judgment for Pennington that Article V of the CPA requires Fields and Phillips to purchase Pennington's shares in Advantage. We remand the case for further proceedings consistent with this opinion.

*/Leslie Osborne/*

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LESLIE OSBORNE  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

CURTIS C. PENNINGTON,  
Appellant

No. 05-19-00149-CV      V.

JOHN P. FIELDS AND KYLE B.  
PHILLIPS, Appellees

On Appeal from the 162nd Judicial  
District Court, Dallas County, Texas  
Trial Court Cause No. DC-16-15018.  
Opinion delivered by Justice  
Osborne. Justices Schenck and  
Pedersen, III participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED AND RENDERED** in part and this cause is **REMANDED IN PART** to the trial court for further proceedings consistent with the Court's opinion.

It is **ORDERED** that appellant Curtis C. Pennington recover his costs of this appeal from appellees John P. Fields and Kyle B. Phillips.

Judgment entered May 22, 2020